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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 IN RE: Bard IVC Filters Products
10 Liability Litigation,
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No. MDL 15-02641-PHX-DGC
ORDER

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14 The Plaintiffs Steering Committee (“PSC”) moves to modify Case Management
15 Order No. 6 (“CMO 6”) to increase the common benefit assessments. Doc. 16932 at 3-6.
16 Defendants and counsel for many individual plaintiffs oppose the proposed increases.
17 Docs. 17367, 17387-17404, 17433, 17555. A hearing was held on May 29, 2019.
18 Doc. 17966. For reasons stated below, the Court will grant the motion in part and deny it
19 in part.

20 **I. CMO 6 – Common Benefit Funds and Assessments.**

21 CMO 6 was issued early in this MDL to provide for the fair and equitable sharing
22 among plaintiffs and their counsel of the burden of litigating this complex case. Doc. 372
23 at 1. CMO 6 provides that compensable common benefit work includes meetings and
24 conference calls, court appearances, discovery, document review, expert retention and
25 development, legal research, motion practice, bellwether cases and trials, settlement
26 efforts, and all other work that advances this litigation to conclusion. *Id.* at 1-2, 7-8. The
27 time spent performing common benefit work must be authorized by Plaintiffs’ Co-Lead
28 Counsel and recorded accurately and contemporaneously. *Id.* at 8-9.

1 CMO 6 provides for the establishment of two interest-bearing accounts to receive
2 and disburse common benefit funds: the “Bard IVC Filters Fee Fund” and the “Bard IVC
3 Filters Expense Fund.” *Id.* at 9. The Court has granted the PSC’s request to establish these
4 accounts and has appointed Citibank, N.A., as escrow agent. *See* Docs. 17777, 16932
5 at 2-3. The accounts will be funded through assessments on the gross monetary recoveries
6 received by plaintiffs and their counsel in this MDL. *Id.* at 9. The current total assessment
7 amount is 8%, which includes 6% for attorneys’ fees and 2% for expenses. *Id.* at 10.

8 **II. The PSC’s Motion to Increase the Assessment Percentages.**

9 The PSC proposes to increase the attorneys’ fees assessment to 9% and the expense
10 assessment to 5%. Doc. 16932 at 3. The PSC contends that the duration, scope, size, and
11 cost of this litigation have outstripped the PSC’s expectations when it proposed the initial
12 assessment percentages. *Id.* The PSC further contends that the current percentages are
13 conservative and MDL courts routinely approve increases as litigation develops. *Id.* at 4-5.

14 **A. The Litigation’s Duration and Scope.**

15 Given that Bard had been litigating IVC filter cases for years when the MDL was
16 formed in late 2015, the PSC asserts that “trials stretching into 2019 seemed unlikely.” *Id.*
17 at 4. The Court cannot conclude that bellwether trials were unforeseeable when CMO 6
18 was entered. Such trials are commonplace in mass tort MDLs and were discussed at the
19 first case management conference. *See* Doc. 174 at 25-26.

20 The PSC estimated, however, that all bellwether trials would conclude by April
21 2017. *Id.* at 25. The final bellwether trial ultimately was scheduled for May 2019 – more
22 than two years later than the PSC expected. Moreover, the parties did not complete all
23 common discovery and file dispositive motions until late 2017, nearly a year longer than
24 the PSC expected. *Id.* at 24-25. Although the overall duration of this litigation is not long
25 for a mass tort MDL, the PSC’s initial expectation that the litigation would end sooner was
26 not unreasonable.

27 The common benefit work has included millions of pages of document review,
28 substantial ESI discovery, dozens of depositions, many experts and Daubert challenges,

1 multiple summary judgment motions, numerous motions in limine, three three-week
2 bellwether trials, post-trial motions and appeals, and substantial settlement efforts.
3 Defendants' preemption motion involved more discovery and was more complex than the
4 PSC anticipated. Several trial preservation depositions will yet be taken, and the PSC has
5 agreed to prepare trial packets for lawyers whose cases are remanded or transferred.

6 The PSC states that while it was prepared for protracted litigation, it did not fully
7 anticipate the scope of this MDL when it proposed the initial assessment percentages.
8 Doc. 17687 at 3. The Court finds there was significant unanticipated common benefit work
9 that justifies an increase in the attorneys' fees assessment percentage. The Court will
10 increase the attorneys' fees assessment from 6% to 8%. The Court will not grant the
11 requested increase to 9% because the Court does not agree with the PSC's argument that
12 this case will include a significant amount of future work by the PSC. During oral
13 argument, Mr. Lopez noted that some transferor courts may allow the parties to take
14 updated depositions of Bard or other witnesses and that members of the PSC may be asked
15 to consult with lawyers who try cases in transferor courts. Even if true, the Court does not
16 view these as responsibilities of the PSC that should be charged to the common benefit.

17 The Court notes that the 8% assessment for attorneys' fees represents a holdback,
18 not a determination of the final amount to be disbursed out of the common benefit fee fund.
19 *See* Doc. 372 at 10.

20 **B. Reliance on the Current Assessment Percentages.**

21 In February 2019, the parties informed the Court that a large number of cases had
22 settled in principle and many others were near settlement. *See* Doc. 15176, 15629. Nearly
23 2,000 of the cases settled in principle by execution of a settlement term sheet have been
24 brought by the law firms of Freese & Goss and Matthews & Associates. Doc. 17367 at 1.
25 Counsel from these settling law firms and Defendants have represented that another 2,000
26 or so cases are near settlement. The settling law firms argue that they relied on the 6%
27 attorneys' fees assessment in negotiating the settlements, and that it would be unfair to
28 increase the assessment at this late date. Docs. 17367 at 2-3, 17404 at 2. Other law firms

1 with cases in this MDL have joined these arguments. Docs. 17367, 17387-17403, 17433,
2 17555.

3 The purpose of a common benefit fund is to ensure that attorneys who perform work
4 that benefits all plaintiffs and their counsel are reasonably compensated. The PSC
5 managed and litigated this complex litigation to a conclusion, obtained a \$3.6 million jury
6 verdict in the Booker case and a fair settlement in the Tinlin case, withstood Defendants'
7 preemption challenge to the viability of every plaintiffs' claims, and amassed evidence and
8 experts that benefit all plaintiffs and their counsel. The settling law firms do not challenge
9 the quality of this work, nor do they dispute that the work benefitted them and their clients
10 significantly.

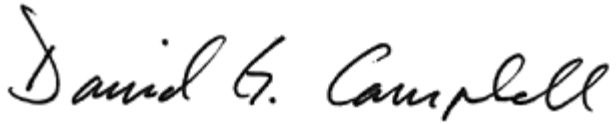
11 The justifiable reliance argument of the settling law firms has persuasive force, but
12 the Court concludes that simple fairness requires that these firms – which will benefit
13 financially from the work of the PSC – pay reasonable compensation to the lawyers who
14 secured the benefit. The Court also notes that the PSC's motion is based in part on
15 uncertainty about settlement values because Defendants and the settling law firms have
16 declined to disclose the terms of their settlement agreements, even to the PSC. In light of
17 this uncertainty, the PSC believes that the current 6% assessment for attorneys' fees may
18 not be sufficient to reasonably compensate the PSC for the tens of thousands of hours of
19 common benefit work performed to date. *Id.* at 3-4. This is a legitimate concern. The
20 Court has no information about the value of the settlements reached to date, and concludes
21 that this is another reason to increase the attorneys' fee assessment to 8%.

22 The Court reaches a difference conclusion with respect to costs. The justifiable
23 reliance argument is more compelling when applied to individual plaintiffs. Although the
24 PSC initially argued that an increased assessment would not change the amounts individual
25 plaintiffs would receive in any settlement (Doc. 17687 at 2), it acknowledged at the hearing
26 that costs generally are born by clients and the proposed 3% increase would be paid directly
27 by individual plaintiffs, including those who have already agreed on settlement terms with
28 Defendants. The Court is more concerned about increasing the amount of costs to be borne

1 by individual plaintiffs (especially after they have reached a settlement in principle) than
2 it is about requiring lawyers to pay their fair share of the work that secured settlements for
3 their cases. The Court will not increase cost amounts for individual plaintiffs at this late
4 date.

5 **IT IS ORDERED:** The PSC's motion to modify CMO 6 (Doc. 16932 at 3-6) is
6 **granted in part and denied in part.** The attorneys' fees assessment is increased from 6%
7 to 8%. The 2% expense assessment is not changed. The first sentence of Section IV(B)(3)
8 of CMO 6 is amended to read as follows: "The assessment amount is 10%, which includes
9 8% for attorneys' fees and 2% for expenses." *See* Doc. 372 at 10.

10 Dated this 31st day of May, 2019.

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14 David G. Campbell
15 Senior United States District Judge
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